No.85-1355 (2)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

MICHAEL FLEMING and ANASTASIA FLEMING,

Petitioners,

vs.

ALLSTATE INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the New York Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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Petitioners,

vs.

ALLSTATE INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the New York State Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In this case, petitioners Michael Fleming and Anastasia Fleming seek review by this Court of the dismissal of their claim for punitive damages asserted in an action in the New York Supreme Court, Suffolk County, based upon a breach of an

insurance contract by respondent, Allstate Insurance Company ("Allstate").[1]

As alleged in petitioners' complaint, Allstate wrongfully cancelled a liability policy on petitioners' motor vehicle after petitioners failed to pay the additional premium required because petitioner Michael Fleming, not his mother, petitioner Anastasia Fleming, was the principal driver. Thereafter, a default judgment of $3,916.11 was entered in a subrogation action against petitioners arising from an automobile accident as to which Allstate had disclaimed any obligation to defend or indemnify. The default judgment was later vacated. In a declaratory judgment in the reopened subrogation action Allstate was ordered to defend and indemnify petitioners.

Thereafter, as set forth in the order and decision of the Supreme Court, Suffolk County (Hon. Thomas V. Mallon, J.), dated August 22, 1983 (Petition, p. A-8), Allstate settled the subrogation claim within the policy limit.

As set forth in Justice Mallon's decision (Petition, p. A-9), the complaint as amplified by the motion papers submitted by petitioners' attorney contended that Allstate acted in bad faith as part of a scheme in its dealings with the general public to engage in fraudulent activity based on the following specific acts:

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1. The parent company of respondent Allstate Insurance Company is Sears, Roebuck and Co. The affiliates and subsidiaries of respondent include Allstate International, Inc., Allstate Insurance Company, Ltd., Allstate Reinsurance Company, Ltd., Seibu Allstate Life Company, Ltd., Allstate Automobile & Fire Insurance Co., Lincoln Benefit Life, PMI Mortgage Insurance Co., Surety Life, Tech-Cor, Inc., Commercial Insurance Division, and Northbrook Prop. & Cas. Insurance Company.

—Cancelling the policy despite petitioners' claim that the additional premium was not required because the principal driver was petitioner Anastasia Fleming and not the son, petitioner Michael Fleming.

—Using a type size known to be too small on the cancellation notice.

—Submitting an affidavit with a notary date of April 8, 1977 affirming mail service of the notice on April 12, 1977.

—Refusing to indemnify petitioners on entry of the subrogation judgment.

Petitioners' complaint sought $10 million in compensatory and $50 million in punitive damages.

The trial court (Justice Mallon) declined to dismiss the complaint because at least one cause of action was stated in breach of contract on petitioners' allegation that the insurance contract had not effectively been cancelled because of legal technicalities in giving notice of the cancellation (Petition, p. A-10).

The court did not, therefore, address the parties' arguments and evidence on the other allegations. In particular, the court did not pass on the issue of whether petitioner Michael Fleming was the principal driver, as admitted by petitioner Anastasia Fleming in an April 10, 1978 interview. Nor did the court sustain petitioners' denial of actual notice of cancellation in light of the deposition of their insurance broker, a nonparty, who testified that they had admitted its receipt.

On appeal by Allstate, the Appellate Division of the New York Supreme Court sustained Justice Mallon's decision, except for petitioners' claims for compensatory damages for emotional distress and punitive damages.

As to punitive damages, the only issue raised in petitioners' application to this Court, the Appellate Division ruled that petitioners had not alleged facts sufficient to justify an award of such damages under New York law. Specifically, petitioners had not alleged "that defendant, in its dealings with the general public, engaged in a fraudulent scheme which demonstrates 'such wanton dishonesty as to imply a criminal indifference to civil obligations' (citations omitted)." (Petition, p. A-5).

The Appellate Division accordingly dismissed petitioners' claim for punitive damages (Petition, p. A-3).

By order of the Supreme Court, Suffolk County (Hon. Paul J. Baisley, J.), dated July 29, 1985, petitioners were awarded $1,282.50 on their claim for compensatory damages, and this sum with principal and interest was paid to the court by Allstate after petitioners' attorney's refusal of its tender.

Petitioners appealed the Appellate Division order striking their punitive damages claim to the New York Court of Appeals without raising any of the federal questions contained in their petition. They limited their appeal to that court to the issue whether the alleged misconduct on Allstate's part was sufficient for an award of punitive damages under New York law.

The New York Court of Appeals, by order entered November 14, 1985, affirmed the Appellate Division order for the reasons stated in the Appellate Division decision, and further noted that the motion papers showed no basis for amending the complaint to state a claim for punitive damages (Petition, p. A-1).

SUMMARY OF ARGUMENT

The New York law of punitive damages, requiring a showing of public wrong in insurance claims settlement matters, is constitutional.

ARGUMENT

Petitioners erroneously contend that the New York Court of Appeals has determined that no factual allegations against an insurance carrier can ever meet the required showing under New York law for an award of punitive damages. Thus, in petitioners' view, the New York Court of Appeals has held that punitive damages are unavailable against insurance carriers no matter how outrageous their conduct (Petition, p. 7).

From petitioners' false premise flow all of petitioners' federal arguments: That the rule deprives petitioners of their right to a jury trial on the issue of punitive damages (Petition, p. 7), discriminates against claims sounding in contract rather than tort (Petition, p. 8), impairs petitioners' contract right under their insurance policy (Petition, pp. 9-10), and conflicts with federal decisions (Petition, p. 11).

None of petitioners' points has even superficial merit.

At base, petitioners' petition is nothing but reargument of their appeal to the New York Court of Appeals on the sole issue whether the allegations in their complaint and motion papers in this case satisfied the requirement of a public wrong, as set forth in the Appellate Division decision (Petition, p. A-5). Unwilling to accept the New York appellate courts' rulings on the adequacy of their allegations on this point, petitioners argue that the public wrong requirement is, in effect, a sham, and that punitive damages are, in fact, never available in insurance claim settlement cases.

Yet, New York cases have sustained claims for punitive damages where the allegations met the public wrong criterion. *See, e.g., P.S. Auctions, Inc. v. Exchange Mut. Ins. Co.*, 105 A.D. 2d 473, 480 N.Y.S. 2d 610 (3d Dep't 1984) (allegation in affidavit that carrier had a practice of delaying settlement).

Furthermore, petitioners cite no authority for the proposition that punitive damages are mandated in insurance claim settlement cases by federal constitutional provision, statute or regulation.

All that petitioners submit in support of their petition is the erroneous statement that the New York Court of Appeals' decision in this case did not set forth its reasoning on the public wrong requirement on which the Appellate Divisions of the New York Supreme Court had split (Petition, p. 5). In fact, however, the Court of Appeals' decision expressly adopted the reasoning of the Appellate Division, Second Department (Petition, p. A-1). Regardless of the fact that the District Courts in the federal securities fraud cases of *Banco Nacional de Costa Rica v. Bremar Holdings Corp.*, 492 F. Supp. 364 (S.D.N.Y. 1980), and *Justen v. Rothschild, Unterboerg, Towbin, Gruntal & Co.*, 554 F. Supp. 331 (S.D.N.Y. 1983), followed what they believed to be the New York rule, the highest state court of New York — the Court of Appeals — has now reaffirmed the public wrong requirement for New York suits seeking punitive damages in insurance claims settlement matters. *See generally, Samovar of Russia Jewelry Antique Corp. v. General Ins. Co. of Trieste and Venice,* 102 A.D. 2d 279, 476 N.Y.S. 2d 869 (1st Dep't 1984).

Nothing in the other federal punitive damages decisions cited by petitioners advance their proposition that there is a federal constitutional imperative that overrides New York's common law requirement for a public wrong allegation. *See Willoughby Roofing & Supply Co. v. Kajima International, Inc.*, 598 F. Supp. 353 (N.D. Ala.), *aff'd*, 776 F. 2d 269 (11th Cir. 1985) (arbitrators' authority to award punitive damages); *Willis v. Shearson/American Express, Inc.*, 569 F. Supp. 821 (M.D.N.C. 1983) (New York rule prohibiting punitive damages awards in arbitration).

Nor is the issue before this Court in *Aetna Life Ins. Co. v. Lavoie,* 470 So. 2d 1060 (Ala. 1984), in any way related to the New York public wrong requirement complained of by petitioners. In *Lavoie* the insurance carrier challenges an award of $3.5 million in punitive damages. In petitioners' case, the issue is whether punitive damages — in whatever amount — can constitutionally be conditioned on a showing of a public wrong. Petitioners cite no authority to demonstrate that the condition is unconstitutional.

Nor do any of the other decisions cited by petitioners in support of their federal constitutional points relate to this punitive damages issue. *See Robb v. Connolly,* 111 U.S. 624 (1884) (habeas corpus); *Ross v. Moffitt,* 417 U.S. 600 (1974) (right to counsel); *United States Trust Co. v. New Jersey,* 431 U.S. 1, *reh. denied,* 431 U.S. 975 (1977) (bondholder's challenge to statute regulating transportation subsidies of government agency); *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, *reh. denied,* 439 U.S. 886 (1978) (employer challenge to statute regulating private pension plan); *Sumner v. Mata,* 449 U.S. 539 (1981) (habeas corpus); *Allen v. McCurry,* 449 U.S. 90 (1980) (civil rights suit), and *Yale Auto Parts, Inc. v. Johnson,* 758 F. 2d 54 (2d Cir. 1985) (denial of government permit).

Accordingly, petitioners' application for certiorari to the New York Court of Appeals is meritless and should be denied.

CONCLUSION

Inasmuch as punitive damages are not a remedy mandated by federal constitutional provision, statute or regulation for insurance claims settlement cases, the decision of the New York Court of Appeals dismissing petitioners' claim for such damages under New York common law involves no federal question.

Therefore, the petition for certiorari to the New York Court of Appeals should be denied.

Respectfully submitted,

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